Australian Initiatives:
Enforcement in Difficult Contact Cases

An Address Presented By

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Early Interventions - A Framework for Contact

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Introduction

As an Australian, I am greatly honoured by this opportunity to address a gathering at the Royal Society. The involvement of the Society and its President, Sir Joseph Banks, played a pivotal role in the foundation of my country in its modern form. However I stress the latter point. It is all too often forgotten that Australia has an ancient and proud history that extends back into the mists of time. Our indigenous people had a vibrant culture thousands of years prior to the arrival of Cook and Banks. Nevertheless the latter played a most significant part in creating our modern nation.

Families in Focus

Family Law is particularly suited to international comparisons and multi-disciplinary attention. Its very human and complex problems are common to all societies.

We live in a time of great change in relation to family law but at least one consistency persists: that notwithstanding our efforts to improve the law, it is a blunt instrument for dealing with the fallout that often accompanies the breakdown of intimate relationships. Sadly, it also seems commonplace to find that children are caught up in the turbulence and in their parents' disputes over contact.[1] Sometimes the contact difficulties are episodic and there is a core of cases in which, for various reasons, contact arrangements become chronically intractable.

In this address, I aim to explain some recent Australian initiatives that are intended to improve children's contact and to discuss their implementation. Central to our approach, and important to highlight at the very outset, are two essential features of Australian family law.

First, Australian law mandates an individualised approach to the resolution of disputes about children, using the best interests of the child as the paramount consideration.

[1] Recent Australian attention to the problems of contact may be seen in Joint Select Committee on the Operation and Interpretation of the Family Law Act (1992) *The Family Law Act 1975 – Aspects of its Operation and Interpretation*, AGPS, Canberra; Australian Law Reform Commission (1995) *For the Sake of the Kids - Complex Contact Cases and The Family Court*, AGPS, Canberra; Family Law Council (1998) *Child Contact Orders: Enforcement and Penalties*.

Presumptions do not operate. Each case and each proposal concerning the child within each case must be examined and evaluated on its merits.[2]

Secondly, to the extent that the legislation speaks about rights of contact, it is the right of the *child* not the right of a parent and the right of the child is a qualified one which is subject to the child's best interests. This principle was established prior to recent legislative amendments[3] and still continues to apply.

It is also important to remember the emphasis in the Australian family law system upon the need to conciliate family disputes. To this end, the Family Court employs a large number of psychologist/social worker mediators and staff lawyers (Deputy Registrars) whose primary function is to try to assist the parties reach agreements. Recent Government attempts to direct some of this work into the private sector have reduced the effectiveness of the Court's service without improving the overall effectiveness of the services offered to the public generally, but the Court still remains a significant force for conciliation and mediation.

In my contribution to your conference today, I will begin with some reflections on the nature of contact after relationship breakdown. I then briefly explain the constitutional framework in which the Commonwealth *Family Law Act* 1975 operates and then highlight the main legislative provisions that govern decisions about applications for parenting orders and how they have been interpreted. The paper next discusses a scheme that was recently enacted with the aim of better enforcing orders concerning children. In doing so, I look to some recent research evidence which suggests that the assumptions underlying the new compliance regime may require modification. This is of some importance to other jurisdictions which may be attracted to the new Australian model.

Contact in Perspective

[2] See for example the Full Court of the Family Court decisions in *Burton and Burton* (1979) FLC ¶90-622; *Smith and Smith* (1994) FLC ¶92-488.
[3] See the Full Court decision of *Brown and Pedersen* (1992) FLC ¶92-271.

Speaking from Australian experience, it seems that about half of all separating families do not come near to a court to seek the adjudication of contact or any other family law dispute - they work it out for themselves. Of the other 50% who do approach a court, (only some of which involve contact disputes), roughly 95% manage to resolve their disputes in a consensual way.

That is not to say that those agreements work out perfectly or even at all, particularly where the parties have been ill-advised or pressured into ill-fated regimes, and I shall have more to say about this later in my address. But nevertheless, the upshot is that the cases that present problems are a very small percentage of the relevant population. I think that this is important to keep firmly in mind, because the admitted deficiencies the system offers in relation to these difficult and small number of cases are all too often used as a springboard to attack the family law system as a whole, and I regard this as quite unjustified.

When we look to analysing contact enforcement problems, we need to appreciate what the making of a contact order involves and that it has different meanings and ramifications for the persons who are affected by it.

From the point of view of the residence parent, it can be an interference with her or his freedom to live as she or he wishes. It may involve being restricted in the location of residence that in turn may constrain the capacity to take up job or study opportunities or form new partnerships. These are common features of contested applications for what are called relocation cases or applications for leave to remove the child from the jurisdiction.

The contact parent may see contact through a different lens. He or she feels deprived of the formerly constant capacity to enjoy being with the child and they may blame the former partner for what is perceived to be the injustice of being rationed to limited periods of time. Indeed, feelings of resentment are often mutual, in some cases intractable, and on occasion used to manipulative advantage by a bitter residence parent.

Of particular significance is the perspective of the child. Contact orders can be quite irksome for many differing reasons. The transformation of a relationship into a timetabled obligation can involve children feeling that their time is overly regulated and, particularly with older children, that their opportunities to spend time with friends is controlled. The attractiveness of contact can also be undermined by the hostility that children may see or sense between their parents, particularly at hand-over points. There are also cases where children feel that, because they have more to do with the residence parent, they tend to side with her or him out of feelings of security and loyalty and to therefore devalue contact.

Some contact parents do not make contact appealing. At best, they may be unable to devise meaningful experiences but there are also parents who resort to bribery, putting the child under cross-examination about the residence parent or their partner, or in a position of feeling guilty and torn in loyalty. Some children are frankly bored with the regime. With younger children, there are special difficulties associated with the anxiety of spending time away from a primary care-giver.

All of these situations that I have seen point to the fact that contact is not a simple matter which can be solved by a single, simplistic or formulaic solution.[4]

Sharing Responsibilities, Not Halving Time

It should be understood that in Australian law all parents, whether married or unmarried, have shared parental responsibility unless the Court otherwise orders. The Court may make residence orders in favour of both parents, for example, as to ten days in each fortnight in favour of one parent and four in favour of the other. This could just as easily be expressed as a residence/contact order but it has the advantage in some cases of making the parent who has the lesser time feel more involved with the child and is a useful resolution tool. It is a method of conveying the message that the parent who has less time with the child is still important in their lives. However shared parenting does not, and in most cases should not, mean equal time.

[4] Dewar, J. (1997) "Reducing Discretion in Family Law" Vol 11 No. 3 *Australian Journal of Family Law* 309.

Shared parenting, in my view, only works where the parties and children are highly co-operative, and families with these friendly dynamics rarely come to the attention of the courts.

An equal time arrangement is all too often extremely disruptive to the children and not practical having regard to the work obligations of the parents and the needs of the children. It is also not a child-focussed solution but one that is focussed upon the needs of the parents.

In an ideal world, it would be unnecessary to have rigid orders and separated families would amicably work things out as time progresses, circumstances change and children change as they progress through developmental stages. As I have said, many families do approximate this ideal and we should not lose sight of the fact that we are focussing here today on the smaller sharp end of cases who are problematic for themselves and also for the courts.

With these preliminary comments in mind, I would like to introduce you to the place of our courts within our constitutional system.

The Australian Constitutional Framework

Australia's Constitution divides legislative powers between the Federal Parliament on the one hand, and the various State and Territory Parliaments on the other. We have no Bill of Rights and the Constitution pays very little attention to private law issues

Limitations on the types of matters about which the Commonwealth Parliament can make laws naturally restrict the areas over which the Family Court can adjudicate. The fact that these limitations in no way reflect the circumstances of peoples' lives (and probably never did) is an historical legacy which is not easily rectified[5]. Essentially the Federal Parliament is given power to legislate in respect of specific matters identified in the Constitution, with State and Territory Parliaments empowered to legislate without such restrictions, providing their laws are not inconsistent with any federal law.[6]

Our Constitution **does not** contain a power permitting the Federal Parliament to make laws concerning children or their protection - what may be generally termed "public family law matters". Such matters are left to the States and Territories, which have developed their own children's courts and laws governing child protection and juvenile justice. These laws are certainly not uniform and are not necessarily even consistent. As you can imagine, many parenting disputes which find their way into the Family Court involve allegations of child abuse which precipitate the separation or arise out of subsequent parenting disputes. Indeed such cases have been described as the Court's core business[7].

The Constitution **does** provide that the Federal Parliament may legislate in respect of what may be termed "private" family law matters, that is: marriage, divorce and

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[5] See the High Court of Australia decision in *Northern Territory of Australia v GPAO and Ors* (1999) FLC ¶92-838 per Gleeson CJ and Gummow J at para 87, per McHugh and Callinan JJ at para 162. As to the distinction between "jurisdiction" and "power" see *Harris v Caladine* (1991) FLC ¶92-217 per Toohey J at 78,493.

[6] The Australian Constitution s109.

[7] Brown, T., Frederico, M., Hewitt, L. and Sheehan, R. (1998). *The Management of Child Abuse Allegations in Custody and Access Disputes before the Family Court of Australia.* Monash University Clayton and the Catholic University Canberra; Brown, T. with Sheehan, R., Frederico, M., and Hewitt, L. (2002) *Resolving Family Violence To Children* available at http://www.familycourt.gov.au/papers/html/magellan.html

related parental rights, custody and guardianship of infants.[8] Excluded from this list - and therefore the responsibility of States and Territories – are (in addition to child protection and juvenile justice) issues arising from relationships between unmarried couples such as property settlement and adoption (irrespective of whether the application is by an individual, a married or de facto couple).

The reach of the federal law remained limited in this way for more than another decade. Until the late 1980s, disputes about children born to unmarried parents were excluded from Commonwealth jurisdiction, as there was no head of power to support such legislation. As just under 30% of all Australian children are born out of marriage, their exclusion from the Family Court and its counselling and other services was patently discriminatory. Fortunately, after significant inter-governmental negotiations, by 1990 all States and Territories referred their powers in this area to the Commonwealth, except Western Australia which has complementary legislation.

As a result I think Australia is one of very few common law countries, which now makes no legal distinction between children born to married and unmarried parents. Assuming paternity is not an issue – and modern medical technology has largely removed what was frequently a major dilemma – each parent has the same ambit of parental responsibility for their children unless there is an order to the contrary.

The Family Law Reform Act 1995 (Cth)

A raft of significant changes were made in 1996, as a result of the *Family Law Reform Act* 1995. There is little doubt that that Act was a genuine attempt at some reform, for example, the changes in terminology I will mention were intended to dissuade parents from thinking in terms of "winning or "losing" in children's matters. A number of the changes that were made were, however, cosmetic and designed to create the effect that there had been more reform than was in fact the case.[9]

[8] The Australian Constitution s 51 (xxi), (xxii).
[9] See the discussion in Chisholm, R. (1996) 'Assessing the Impact of the Family Law Reform Act 1995' Vol 10 No 3 *The Australian Journal of Family Law* 177.

The most significant change contained in that Act was to rename the terminology of family law so far as children were concerned. In this regard the Parliament borrowed heavily from the Children Act (UK) 1989:

- The package of responsibilities which were collectively known as "guardianship" became known as parental responsibility for the long term care, welfare and development of the child.
- The prior concept of "custody" was dissected into two separate orders:
  - First, the responsibility for the child's "residence" is limited to that matter only and does not carry with it additional authority;
  - Secondly, the responsibility for the day to day care, welfare and development of the child.
- Access became contact.
- The whole bundle of orders affecting children became parenting orders.

Three provisions introduced by the Reform Act are of particular significance.

Section 60B

In setting out a philosophical guide to decision-making about children, the Reform Act introduced a new provision which was not found prior to the amending Act.[10] Section 60B sets out the object of the part of the *Family Law Act* 1975 (Cth) dealing with parenting orders, including contact and sets out the principles underlying the Part:

> "60B(1) The object of this Part is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

[10] In *B and B: Family Law Reform Act 1995* (1997) FLC ¶92-755*,* the Full Court observed at par 3.28: "The Reform Act employed a new form of drafting which is different from that found previously in the Family Law Act or related legislation. In an apparent effort to ensure that its philosophy is explicit, s 60B(1) is expressed to provide an object, and s 60B(2) sets out four principles underlying that object. Section 60B(2)(a) and (b) reflect articles from UNCROC [the united Nations Convention on the Rights of the Child], while s 60B(2)(c) and (d) provide what may be described as exhortations to those caring for children to act in a manner which is consistent with those children's best interests.
The inclusion of the proviso in section 60B(2), that these are rights "except when it is or would be contrary to the child's best interests", is discussed by the Full Court in *B and B: Family Law Reform Act 1995* (1997) FLC ¶92-755 at pars 3.28ff, particularly 3.33; see also S. Armstrong (2001) 'We told you so… Women's Legal Groups and the Family Law Reform Act 1995' Vol 15 No 2 *Australian Journal of Family Law*, 129.

60B(2) The principles underlying these objects are that, **except when it is or would be contrary to a child's best interests**:

> (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
> (b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and
> (c) parents share duties and responsibilities concerning the care, welfare and development of their children; and
> (d) parents should agree about the future parenting of their children. " (emphasis added)

This piece of legislation is a classic example of the danger of extracting words from an international human rights covenant in a piecemeal fashion and putting them into domestic legislation.

In the first place such Conventions are rarely drafted in a style that enables such incorporation, and secondly a piecemeal approach can in fact have the effect of changing the intended meaning of the Convention when it is incorporated into domestic law.

It will be seen that these provisions pick up some of the words of the United Nations Convention on the Rights of the Child. Of particular relevance for today, section 60B lays emphasis on a child's right to contact with both parents unless this is determined to be contrary to the child's best interests. Section 60B did not create a legal presumption in favour of contact orders, nor does it create rights that are legally enforceable. The Full Court of the Family Court in the appeal case of *B and B: Family Law Reform Act 1995*[11] has clearly rejected those arguments.

[11] (1997) FLC ¶ 92-755.

However the enactment of this section promoted an explosion of contact applications from fathers who thought that the law had changed. It had not done so, but the Government, for political reasons, endeavoured to convey the impression that it had.

Worse still, the section caused a significant increase in applications by non-resident parents (usually fathers) seeking to restrain the residence parent from relocating elsewhere. These applications raise difficult issues, but the volume of work meant that the Court could not deal with these matters in a speedy fashion.

Section 65E

Section 65E expresses the well- known paramountcy principle using the phraseology of "best interests" whereas the provision it replaced spoke in terms of the "welfare" of the child:[12]

> "65E In deciding whether to make a particular parenting order in relation to a child, a court must regard the **best interests** of the child as the paramount consideration." (emphasis added)

Section 68

The Act has always long contained guidance as to the matters that must be considered by a court in determining what will be in the welfare of the child. Section 68 was modified by the *Family Law Reform Act* 1995 (Cth) to incorporate a reference to "best interests" rather than "welfare" consistent with section 65, and the list of factors which must be considered was augmented to include pars 68F(2)(d),(f),(g),(i) and (j) as they appear below:

> "68F(1) Subject to subsection (3), in determining what is in the child's best interests, the court must consider the matters set out in subsection (2).

[12] At par 3.35, the Full Court in *B and B* commented:
"The Explanatory Memorandum to the Bill indicated that the intention was that the substantive law remained unchanged, despite the change in phraseology, although the wording in that memorandum - "the change is not intended to invoke the presumption that a change in wording must mean that a different concept was intended. The term 'best interests' is used as a more appropriate description in accordance with the advice of the Family Law Council" - is perhaps not as clear as might be wished."

68F(2) The court must consider:

(a) any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes;

(b) the nature of the relationship of the child with each of the child's parents and with other persons;

(c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:

(i) either of his or her parents; or

(ii) any other child, or other person, with whom he or she has been living;

(d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;

(e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;

(f) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant;

(g) the need to protect the child from physical or psychological harm caused, or that may be caused, by:

(i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or

(ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;

(h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;

(i) any family violence involving the child or a member of the child's family;

(j) any family violence order that applies to the child or a member of the child's family;

(k) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;

(l) any other fact or circumstance that the court thinks is relevant.

68F(3) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2).

68F(4) In paragraph (2)(f):

Aboriginal peoples means the peoples of the Aboriginal race of Australia;

Torres Strait Islanders means the descendants of the indigenous inhabitants of the Torres Strait Islands." (emphasis added)

The Legal Interaction of Sections 60B, 65E and 68F

The inter-relationship of the new provisions was considered by the Full Court in B and B: Family Law Reform Act[13]. The relevant portion of the decision is found in pars 9.53 and 9.54, where the Court said:

> "9.53 The wording of s 68F(2) makes that clear the Court "*must* consider" the various matters set out in (a)-(l) of that sub-section. That sub-section sets out a list of matters which the Court is required to consider to the extent that they are relevant to the particular case. The weight which is attached to any one consideration will depend upon the circumstances of the individual case and is a discretionary exercise by the trial Judge. The list is similar to the list contained in previous legislation but with the additions previously referred to. The list is not intended to be exhaustive. That is made clear by par (l) "any other fact or circumstance that the court thinks is relevant" . This simply underlines the circumstance that the facts in individual cases may vary almost infinitely, that the inquiry is a positive one tailored to the best interests of the particular children and not children in general, and that the Court is required to take into account all factors which it perceives to be of importance in determining that issue.
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> 9.54 Section 60B is important in this exercise as it represents a deliberate statement by the legislature of the object and principles which the Court is to apply in proceedings [concerning children] under Part VII. The section is subject to s 65E. Nor does it purport to define or limit the full scope of what is ordinarily encompassed by the concept of best interests. The object contained in sub- section (1) can be regarded as an optimum outcome but is unlikely to be of great value in the adjudication of individual cases. **The principles contained in sub-section (2) are more specific but not exhaustive and their importance will vary from case to case. They provide guidance to the Court's consideration of the matters in s 68F(2) and to the overall requirement of s 65E. The matters in s 68F(2) are to be considered in the context of the matters in s 60B which are relevant in that case. But s 65E defines the essential issue.**" (emphasis added)

The Practical Effect of The Reform Act

I would like to now turn my attention to the recently published evaluation titled *The Family Law Reform Act 1995: The First Three Years* – by Ms Helen Rhoades now of the University of Melbourne, Professor Reg Graycar of the University of Sydney, and

[13] See footnote 10 supra.

Ms Margaret Harrison who is my Senior Legal Adviser.[14] They embarked on a study which looked to how the major objectives of the *Family Law Reform Act* 1995 (Cth) did or did not translate into practice, those objectives being:

- to encourage both parents to share the parenting of their children after separation,
- to give prominence to children's rights,
- to emphasise parents' responsibilities,
- to reduce disputes over children and
- to protect children and other family members from violence.

It is important to note that the authors make it clear that their study was an exploratory one and limited in sample size. Nonetheless, its methodology of gaining responses from a range of separating partners, including those who have not accessed any Court services, and counsellors, lawyers and Court staff and Judges, means that the results need to be taken very seriously.

The main message of the report is that, despite such aims, many of the reform's objectives have not been met and the law has become more complex and unclear for both the families themselves, for the lawyers advising them, and for judges, Court staff and others in the system.

Let me point out some of the Report findings that are particularly relevant to today's conference:

- There is no general understanding of what 'shared parenting' actually means and contact parents have unrealistic expectations that it means equal time, or at least regular input into day to day and other decision making

- Encouraging shared parenting after separation is not a realistic option for Family Court clients in dispute over their children. Families with workable shared parenting arrangements tended to arrive at them without resort to the law and indeed, did not know that the law had changed to encourage these arrangements.

[14] Available at http://www.familycourt.gov.au/papers/html/fla1.html

For those in the system for whom co-operation is impossible, often because of family violence, the shift in emphasis to shared parenting has increased the opportunities for dispute and affected children's welfare and often, their safety.

- Changes in terminology have not been widely accepted and have made little or no difference to the behaviour of parents or their lawyers. The traditionally small percentage who proceed to a defended hearing has definitely not been reduced by the amendments. Those who enter the litigation stream - even if they do not go very far along it - are not the people for whom these amendments are (or should be) addressed. They are actually the group who will seek to manipulate and distort the issues and this distracts attention from the children. As one lawyer commented: the only people who know the new language are the 'voracious litigators'.

- The inclusion in section 60B of the *Family Law Act* of a child's "right of regular contact with both parents" has created a climate where judges and lawyers are more likely than before to agree to contact at the interim stage of proceedings, sometimes in circumstances where there are serious concerns about the safety of children and their carers. Orders suspending contact have rarely been made at interim hearings since 1996, despite the high rate of allegations of violence and child abuse in these matters. However, at final hearings, where all the evidence is heard, the number of 'no contact' orders has not changed, suggesting that children are spending periods of time in situations subsequently determined to be unsafe for them.

- There is confusion about the relationship between the 'right of contact', the need for all decisions about children to be made by reference to their best interests, and new provisions that require judges to ensure that parenting orders do not expose children or their carers to 'an unacceptable risk of violence' or conflict with existing family violence orders.

- There has been an increase in the numbers of applications for parenting orders and for enforcement of those orders, particularly by non-residence fathers who see the 'right to contact' as belonging to them rather than their children.

It is against this backdrop that I would like to now discuss the new regime for the enforcement of children's orders that took effect in 2001.[15] It is of particular significance because I note that the recently released report of The Advisory Board on Family Law Sub-Committee chaired by Sir Nicholas Wall, *Making Contact Work*, looked favourably but hesitantly upon the Australian scheme.[16] For reasons I hope become clear, I am in respectful agreement with the Sub-Committee that it would be premature to transpose the Australian model and its assumptions to England.

The Australian Three Stage Compliance Scheme

The provisions which introduced the enforcement of parenting orders compliance scheme came into operation by reason of the Family Law (Amendment) Bill in December 2000. Prior to the new legislation, enforcement was effected by the traditional means of fines, community service orders and/or imprisonment and good behaviour bonds. As we all know, that was not without its difficulties, particularly in high conflict cases.

Those difficulties were considered within the 1992 report of a Parliamentary Joint Select Committee titled *The Family Law Act 1975 – Aspects of its Operation and Interpretation*. The Committee recommended that the Family Law Council which advises the Commonwealth Attorney-General, should conduct a review of penalties that may be applied by in cases of non-compliance with orders. The Council's final report, titled *Child Contact Orders: Enforcement and Penalties*, was released in June 1998 and, generally speaking, is the source of the current three tiered approach to compliance with contact orders: prevention, education, and punishment.

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[15] *Family Law Amendment Act* 2000 (Cth) which came into force on 27 December 2000.

[16] Chapter 14. At par 14.56, the Sub-Committee concluded:
"We also very much agree with the Australian approach that at each stage in the process the obligations of the resident parent are carefully spelled out and the consequences which are to follow if the order is not obeyed. Whilst, as we have made clear, we are attracted to the Australian model it is, as yet, in its infancy; we do not know how it will work in practice, and we do not think it appropriate to recommend following it exactly."

The purpose of the new scheme is to first ensure that persons who are subject to parenting orders are made aware of the possible consequences of non- compliance. This was sought to be achieved by the judge or registrar making an order explaining this to the person concerned, and/or for written material to be distributed to this effect. The second stage involves an educative process with the parties being sent to counselling at some designated outside agency. Finally the third stage involves the imposition of the more traditional penalties. In the event of a person engaging in open defiance of orders, the Court has a discretion to proceed to the third stage from the first.

A contravention may be established in two ways:

- That the person intentionally failed to comply;
- That the person made no reasonable attempt to comply;

In both factual scenarios it must also be established that the person had no reasonable excuse for failing to comply. A reasonable excuse may be demonstrated by a lack of understanding the obligations imposed by the order or that the person "believed on reasonable grounds that the deprivation of contact was necessary to protect the health or safety of a person."

My colleague, Judicial Registrar David Halligan has conveniently summarised the details of the new regime in the following way:

- Failure to comply with orders affecting children[17] is dealt with separately from failure to comply with other orders…
- Part VII now contains a 3 stage "parenting compliance regime" for orders affecting children, covering prevention mediation and sanctions.
- Under Stage 1 of the parenting compliance regime, parties entering into parenting plans and persons affected by parenting orders[18] must be provided with information about the obligations the parenting plan or order creates and the possible consequences of failing to comply with those obligations. People entering into parenting plans must be given information about the availability

[17] New Division 13A uses the term "order under this Act affecting children", which encompasses, but is wider than, the term "parenting order", which covers residence, contact, specific issues and child maintenance orders. See Attachment 1 for the definition of "order under this Act affecting children".
[18] Stage 1 of the parenting compliance regime extends only to parenting plans and parenting orders. It does not extend to the full range of "orders … affecting children" covered by Stages 2 and 3 of the parenting compliance regime.

of programs to help people who experience difficulties in complying with a parenting plan. People affected by parenting orders must be given information about the availability of programs to help people understand their responsibilities under parenting orders and the availability and use of location and recovery orders to ensure parenting orders are complied with.

- Under Stage 2 of the parenting compliance regime, the court may refer either or both of the parties to a post-separation parenting program, and/or make a compensatory contact order, or adjourn the proceedings to allow either or both of the parties to apply for a non-maintenance parenting order[19] that discharges, varies or suspends the order contravened or revives an earlier parenting order.
- Under Stage 3 of the parenting compliance regime, the court **must** make a community service order against the respondent, require the respondent to enter into a bond, make an order varying the order contravened if it is a parenting order, fine the respondent, or impose a sentence of imprisonment on the respondent.
- … the court may require the respondent to enter into a bond, make a community service order against the respondent, fine the respondent, or impose a sentence of imprisonment, including periodic or weekend detention, on the respondent."(footnotes in the original)[20]

Emerging Problems

The new provisions represented an attempt to deal with a problem that besets courts exercising family jurisdiction all over the world and they have some merit. However, not least of the difficulties associated with them has been the fact that there has been insufficient funding or training made available to the agencies involved in the process and most are quite uncertain what their function is. Many are simply not staffed or equipped to deal with the matters referred to them. It is a classic example of legislation being passed that is intended to solve a problem and Government then failing to provide funding and sufficient back up or support.

Many judges and judicial registrars see the provisions as being unnecessarily inflexible, and they certainly impose quite onerous obligations on the Court to explain the nature and consequences of its orders. Since many orders and particularly consent orders are made in the absence of the parties this can usually only be done in writing and one wonders how much attention litigants pay to these written admonitions.

[19] That is, a residence, contact or specific issues order.
[20] D. Halligan "Enforcement of Parenting Orders Under the New Parenting Compliance Regime' A Paper for the Sydney Annual Family Law Intensive, 17 February 2001.

The second stage provides that the Court may order parents who do not comply with a parenting order to attend a nominated post-separation parenting program designed to help in the resolution of conflicts about parenting. The alternative is an order for compensatory contact or an adjournment to allow an application for a variation of an order to be made.

The post separation parenting program regime has proven to be a source of considerable concern. The legislation got off to an unfortunate start when the relevant Department was unable to provide a list of the programs available. Whilst there is now such a list, it apparently does not always give an accurate picture of what is available, sometimes because the service providers have discontinued a particular program, or it runs sporadically or particular personnel with appropriate expertise have left the organisation. The fact is that unlike the Family Court, most of these organisations are ill-prepared to deal with these issues

I have received reports that self represented litigants (particularly fathers) are often showing signs of exasperation, and that some practitioners find the quasi-criminal provisions difficult to deal with.

Our figures show that since the implementation of the amendments in January 2001 the Court has made 71 post- separation parenting orders. Subsequently, 21 notices were received from providers informing the Court that the person ordered to attend was found to be unsuitable or failed to attend. In all, 30% of the orders made did not result in the parent actually attending a program. It is therefore clear that much more commitment is needed from Government to enable these programmes to work. In this regard, I note that Sir Nicholas Wall and his Sub-Committee have identified, in strong terms, a similar concern in respect of the Children and Family Court Advisory and Support Service.

There are a number of legislative improvements to be made and the Court remains willing to work with Government in this regard. What is not always appreciated is that the trigger for the enforcement application is often the fact of an inappropriate order, whether by consent or otherwise, has been made in the first place. I think that it

is clear that the Court needs a power of its own motion to substitute a more appropriate order in lieu of making an enforcement order.

An easy response might be to say that Courts should not sanction inappropriate orders. The trouble is that unless the matter is litigated, the judicial officer making the order will not have sufficient material to form a judgment. These consent orders are usually the subject of a compromise, where either or both parties may have not fully appreciated the effect of the orders when they were made, or circumstances where the orders were reflective of an imbalance of negotiating power or skills between the parties. Also, with changing circumstances such orders can quickly become out of date and have unforeseen and onerous effects.

The Context of Enforcement Disputes - Some Empirical Findings

As yet, we do not have evaluation data on the new regime but recent research by Ms Helen Rhoades sheds some relevant light on the features of contact enforcement applications. The results cast doubt on whether the underlying premises of the new regime are correct[21] and supports the "wait and see" view of the Sub-Committee chaired by Sir Nicholas Wall which did not recommend the transposition of the provisions into English Law. I therefore think it may helpful to look at the study in some detail.

In what is acknowledged to be a limited and small-scale exploration, Ms Rhoades conducted a retrospective analysis of 100 Family Court of Australia files in which a contact enforcement application concerning a child had been listed for hearing in 1999. Thus, the operative law was post the enactment of the *Family Law Reform Act* 1995 but before the new compliance provisions were introduced.

The key features of the data set were that:

- 88% of the 100 files concerned some kind of consent order - only two of the cases involved alleged breaches of final orders made after contested proceedings and a

[21] H. Rhoades 'Contextualising Contact Enforcement Disputes', manuscript submitted for publication.

further 10 cases involved alleged breaches of orders made after alleged breaches of orders made in interim proceedings;

- "most of the disputes had arisen in the early post-separation period, and within a relatively short time of the contact orders being made. The majority (72%) of the applications that could be analysed in this way had been brought within three years of separation, and most had been brought within a year of the orders being made (n = 70), with half of the applications filed in the first six months after the orders had been made (n = 50). Only 10 applications had been filed more than two years after the making of the relevant contact orders";[22]
- "almost all of the enforcement applications were brought by non-resident parents (n = 92), of whom most were men (n = 83). There were only three resident parent applications. These related to breaches by the non-resident parent: one father had breached a condition of the orders by threatening the mother during the contact changeover; a second had refused to return the children following contact; and the third application sought to enforce a condition of the contact orders that restrained the non-resident mother from bringing the children into contact with her new partner. The remaining five applications were brought by members of the child's extended family."[23]

As to the issues which gave rise to the disputes, Ms Rhoades found that in the enforcement cases arising within a relatively short time of the orders being made, misunderstandings of the orders were relatively infrequent. Most centred upon the concerns of one parent about the other parent's experience, competence or capacity to protect and provide care for the child - usually the concerns of the resident parent as to the parent with an order for contact:

> "Concerns about the former spouse's past or current violence appeared in 55 files. The kinds of abusive conduct complained of included stalking, threats of violence (including death threats) assaults (including sexual assaults), and threats and attempts of suicide in front of the children. … It is worth noting at this point that in most of the cases involving violence, the contact orders had been made by consent (n=50)."[24]

[22] *Op. cit.,* footnotes omitted.
[23] *Op. cit.*, footnotes omitted.
[24] *Op. cit.*

Looking to the outcome of the applications, Ms Rhoades also found:

> "Of the 65 cases in which contact had been resisted because of concerns about the non-resident parent's standard of care, only five resulted in a finding that the resident parent had breached the orders without a 'reasonable excuse'. By contrast, in 34 of these cases the orders had been varied to impose more limited or restricted contact arrangements on the non-resident parent than had previously been the case. This included orders that the father have no contact (n = 6), orders for supervised contact (n = 14), and orders imposing conditions on contact occurring (n = 21), such as a requirement that the father complete a parenting course or anger management program, or provisions restraining him from using corporal punishment on the children. Several cases resulted in orders with a combination of supervised contact and conditions. Of the 55 disputes that involved concerns about domestic violence, 32 resulted in the contact orders being changed to restrict or limit contact in some way."[25]

On the basis of these and other findings which time does not permit me to review, Ms Rhoades highlights some disjunctions between the data and the underlying assumptions of the new enforcement regime. Her conclusions, with which I agree, support the need for a cautious approach to any importation of the Australian enforcement regime:

> "While the number of files surveyed for this study was small, its findings nevertheless provide some important early indications of the likely success of the parenting order compliance reforms. For example, given the very few files in which the source of dispute was a misunderstanding about the nature of the obligations imposed by the orders, the research suggests that the new requirement to warn parents about the consequences of breaching contact orders will affect few enforcement cases. It also indicates that parenting education programs are likely to be needed by non-resident parents, perhaps more so than resident parents, and that they will have little impact on the underpinning reasons for many enforcement disputes which involve relationship, rather than contact, issues. In this respect there may be a greater need for relationship counselling than parenting education for some parents. The imposition of penalties, which has been the principal remedy for contraventions for some time, is not an effective method of resolving parental disputes about contact. This is likely to be more particularly so under the new regime, given the entrenched nature of the dispute that will necessarily be a feature of the cases that reach that stage. By that time, the data from this study suggest that it is highly likely that the existing orders will need to be changed, not enforced. The research suggests that the variation provision of the amendments is likely to be their most-used aspect, and that there needs to be an adjustment to the way we look at the breakdown of contact arrangements - that rather than enforcement, we should see the need for continuing

[25] *Op. cit.*

> adjustments of arrangements as an integral part of the process of post-separation parenting. The findings also indicate the need for further investigation of the relationship between consent orders, domestic violence and enforcement applications, and the effects of this inter-relationship upon children and parents who have concerns about the safety of contact arrangements."[26]

Conclusion

The complexity of difficult contact cases must not be under-estimated and to do so is to do a disservice to children. The enforcement of contact orders needs to be understood as other than enforcement of court orders in the usual sense.

Most Court orders require a person to pay money or to carry out or refrain from carrying out some particular act. They are not usually projected many years into the future and they rarely involve parties who have been in an intimate relationship such as marriage. Nor do they involve parties who are required to continue to associate, if only for the purposes of contact, over a period of many years. The subject of the orders are children, not commodities, and their needs and preferences change also as time passes. Many of the parents will re-partner and this of itself often alters the dynamic of the original parties' relationship and may introduce aggravating or, at the least, different factors.

Enforcement of contact is a means to an end and not an end in itself. The end is the opportunity for children to know and have a relationship with both of their parents. This must not become a mantra. This should only happen when the relationship enriches the child. It certainly should not happen when it harms the child.

Family Court Judges do not need to be told that children should have a relationship with both of their parents. We know that. The difficulty is that we are so often faced with the more difficult cases, where it becomes doubtful whether the child really derives any benefit from the relationship, and may even be harmed by it.

[26] *Op. cit.*

I think that the point that is worth making is that this is important social legislation affecting some of the most important and vulnerable people in our community, namely our children. Is this not the very sort of legislation that cries out for the input of social science and mental health professionals like some of those present today, as well as those of us from the legal profession. There are no simple solutions or quick fixes. Each family is different, each child is different and the issue must be approached on an individual basis. These orders are much more complex than we have hitherto supposed and should be treated as such.

I welcome the opportunity to discuss the issues at a seminar such as this as I think that the subject is worthy of much more attention than it has received in the past.

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